

**GAO**

United States  
General Accounting Office  
Washington, D.O. 20548

Office of the General Counsel

B-261111

James P. Dunnick, Jr.  
Director, Division of Resources Management  
Public Health Service  
Indian Health Service  
Department of Health and Human  
Services  
Rockville, Maryland 20857

Dear Mr. Dunnick:

This is in response to your letter requesting our opinion regarding the authority of the Indian Health Service to make lump-sum advance payments incident to a construction contract under the Indian Self-Determination and Education Act as amended by the Indian Self-Determination Contract Reform Act of 1994. We conclude that the payment provisions of 25 U.S.C. § 450i are inapplicable to construction contracts, and may not serve as authority for methods of payment under such contracts. The proper criteria used for payment determinations for construction contracts are those found in 25 U.S.C. § 450j(b) which provide authority for the lump-sum payments proposed by the Service.

#### Background

In 1975 the Indian Self-Determination and Education Act provided tribes with authority to contract with the federal government to operate programs serving their tribal members. Pub. L. No. 93-638, 88 Stat. 2203 (1975); see S. Rep. No. 374, 103d Cong., 2d Sess. 1 (1994). As explained below, Congress recently amended the law to prescribe the terms and conditions which must be used in any contract between the Bureau of Indian Affairs (BIA) or the Indian Health Service (Service or IHS). Indian Self-Determination and Contract Reform Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994); S. Rep. No. 374, at 3.

The Service entered into a self-determination contract with the Fort Belknap Community Council (Council) of Harlem, Montana, a tribal organization, to design

and construct health care facilities for the Fort Belknap and Hays Care Facilities Project (Project). On January 17, 1995, pursuant to the 1994 amendments of the Self-Determination Act, the Council requested immediate payment of the entire contract amount appropriated for fiscal year 1995 (\$3,992,000) for the project.

In February 1995, the Service advised the Council of the issues surrounding advance funding. The Director of the Service concluded that the Secretary has broad discretion in the methods and conditions for advance payments under section 105(b) of the Indian Self-Determination Act, codified at 25 U.S.C. § 450j(b). Under that provision, the Director advised that "consideration must be given to program needs, tribal needs, responsible fiscal management and compliance with the intent of the [Indian Self-Determination Contract Reform Act of 1994]. . . ." Thus, the Director found that the Service had authority to fund an entire fiscal year:

"Change Construction Contract Advance Payments to an Annual Basis.  
The actual advance payment amount would be determined by the projected disbursements to be made within the current fiscal or calendar year. (In other words, a maximum of 1-year's projected disbursement need. In the case of where the project duration is less than a year, the entire contract amount would be advanced.)"

The agency proposed to monitor the payments by requiring quarterly reports documenting disbursements and construction progress. The Director applied this option on a "demonstration" basis for the Fort Belknap project pending further review. The Service provided the Council a lump sum advance payment for a significant amount of the construction project cost. However, since the Service believes claims for advance lump-sum payments for construction contracts might be a recurring problem, it seeks an opinion on whether or not it may continue to provide advance funding for construction contracts under the authority of 25 U.S.C. § 450j(b).

Two questions are presented: Can the Service use the authority found in 25 U.S.C. § 450j to make lump-sum payments to tribal organizations? If not, can the Service make advance lump sum payments to tribal organizations under the authority found in 25 U.S.C. § 450j(b)? As explained in further detail below, the service should not make payments using section 450j criteria for self-determination construction contracts. However, it may make lump sum payments for such contracts under section 450j(b).

#### Analysis

The Indian Self-Determination and Education Act of 1975 authorizes the Secretary, at the request of any Indian tribe, to enter into so-called self-determination contracts with tribal organizations to plan, conduct, and administer programs

including construction programs. 25 U.S.C. § 450f. Payments of such contracts may be made in advance or by way of reimbursement and in such installments and on such conditions as the agency deems necessary to carry out the Indian Self-Determination Act. 25 U.S.C. § 450j(b). The transfer of funds must be scheduled consistent with program requirements and applicable Treasury regulations so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement by the tribal organization. 25 U.S.C. § 450j(b). This provision was deemed essential because many tribes "do not have sufficient funds of their own to operate contracted programs or activities on a reimbursable basis." H.R. Rep. No. 1600, 93d Cong, 2d Sess. 29 (1974). However, as the House Report pointed out, "we shall administer this authority so as to minimize the time elapsing between the date of each payment to a tribal organization and the necessary disbursement of such payment by the organization." *Id.*

During consideration of the 1988 Amendments to the Self-Determination Act, the Senate Committee on Indian Affairs noted that the act had failed to meet its goal of reducing the federal bureaucracy and ending the federal domination of Indian programs. S. Rep. No. 374, at 2. The Committee observed that the goal of ensuring maximum tribal participation in administering federal programs and services had been undermined by burdensome federal regulations. Therefore, Congress authorized the establishment of Tribal Self-Governance Demonstration Projects intended to increase tribal participation through a planning and negotiation process. These projects required a compact of self-governance and an annual funding agreement. Pub. L. No. 100-472, 102 Stat. 2285, 2286 (1988). The law also required the Secretaries of Interior and Health and Human Services to consider and formulate "simple, straightforward" regulations with the participation of the Indian tribes. See S. Rep. No. 374 at 8. Six years passed before BIA and IHS published the proposed regulations. Congress considered these regulations to be "in numerous instances" more restrictive than the regulations they replaced. *Id.* Tribal reaction to the new regulations was "extremely negative." *Id.*

This prompted passage of the Indian Self-Determination Contract Reform Act of 1994 (Act) which prescribes a "model agreement" with the terms and conditions which must be used in any self-determination contract between an Indian tribe and the Service. 25 U.S.C. § 450f. This eliminated the need for the BIA and IHS regulations. The model agreement specifically provides the manner in which payments may be made:

" . . . for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement . . . on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as

semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement . . ."

25 U.S.C.A. § 450j(c); see also S. Rep. No. 374, at 11.

On its face this model contract provision applies to all self-determination contracts and authorizes quarterly lump-sum payments. 25 U.S.C. § 450j(a). However, the Act did not change the payment and transfer provision in section 450j(b). Moreover, the Act amended section 450j by adding subsection (m) which specifically provides that a construction contract<sup>1</sup> requested, approved, or awarded is not subject to the 25 U.S.C. § 450j model agreement provisions. 25 U.S.C. § 450j(m). Thus, the model agreement payment provisions of 25 U.S.C. § 450j are inapplicable to self-determination construction contracts and cannot be used as authority for payment under such contracts.

The proper criteria for payment determinations for construction contracts are those found at 25 U.S.C. § 450j(b). That section provides:

"Payments of any grants or under any contracts . . . may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part [Indian Self Determination]. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization."

The second sentence of section 450j(b) admonishing the Secretaries to minimize the time between payment and disbursement must be read in context with the rest of section 450j(b). The first sentence authorizes the Secretary to make payments in advance or by reimbursement and under such conditions as the Secretary deems

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<sup>1</sup>Construction contracts are fixed-price or cost-reimbursement self-determination contracts for construction projects, except that such term does not include: contracts limited to providing planning services and construction management; for the Housing Improvement Program or roads maintenance program of BIA; or for the health facility maintenance and improvement program administered by HHS. 25 U.S.C.A. § 450b(m).

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necessary to carry out the purposes of Indian self determination. The second sentence requires the Secretary to schedule the transfer of funds consistent with program requirements and applicable Treasury regulations<sup>2</sup>, with the admonition to minimize the time between fund transfer and disbursement by the tribal organization. This clearly provides the head of the agency with broad discretion concerning the size and timing of the installments and the conditions of the payments. The specific language concerning the timing of the transfer of funds indicates that the primary (or at least co-equal) consideration is that it "shall be scheduled consistent with program requirements." The legislative history indicates that this scheduling requirement was meant to be an administrative mechanism to control the flow of fund transfers. H.R. Rep. No. 1600, at 29. Although Congress' reference to "applicable Treasury regulations" reinforces its concern to minimize the time between fund transfer and disbursement, this concern should not be read as an ironclad injunction. We think this is clear from the language of the second sentence and from the third sentence, which permits the tribal organizations to retain interest earned on funds advanced pending disbursement.

Accordingly, the appropriate Secretary has a fair degree of discretion regarding the timing of the fund transfers. On the basis of the record before us, we do not find unreasonable the agency's decision to provide funding to the Fort Belknap Council on an annual basis, while requiring quarterly reports documenting disbursements and construction progress. I trust the foregoing is responsive to your inquiry.

  
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<sup>2</sup>General Treasury guidance for fund transfers applies only to states. See 31 C.F.R. §§ 205.3, 205.7(b)(1995). Our Office is not aware of any Treasury regulations governing the transfer of funds to tribal organizations.